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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

LEATHAN FORD, Plaintiff and Respondent, v. EDWARD KRUG et al., Defendants and Appellants.	A116327 (San Mateo County Super. Ct. No. 443878)
LEATHAN FORD, Plaintiff and Respondent, v. EDWARD KRUG, Defendant and Appellant.	A118824

We conclude in these two consolidated appeals before us that the trial court erred by denying appellants' motions to set aside a series of judgments entered against them in this procedurally convoluted action. We find that one of the judgments entered pursuant to a stipulation by appellants' counsel is void for lack of implied or express authority; the others must be set aside under the mandatory and discretionary provisions of Code of Civil Procedure section 473. We therefore reverse the denials of the motions to vacate the judgments, and reverse all of the judgments entered in the case against appellants.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Late in 2003, respondent Leathan Ford defaulted on the mortgage payments for her home in Daly City, and one of the mortgage holders recorded a Notice of Trustee's

sale of the property, with a scheduled sale date of January 20, 2004. Soon thereafter, Ford was contacted by real estate agent appellant Clayton Chamberlin,[1] an associate of appellant Edward Krug in the licensed real estate brokerage firm known as Horizon Land & Loan (Horizon). After discussions with appellants, respondent entered into a "Residential Lease with Option to Re-Purchase" agreement (the agreement) with them. Pursuant to the terms of the agreement, which are not at issue in this appeal, appellants arranged to sell the property through Chamberlin to investors Alexander Gabovich and Michael Harbison for a purchase price of $453,006. Appellants advanced some money to respondent and unsuccessfully attempted to obtain postponement of the scheduled trustee's sale. In exchange, on December 31, 2003, respondent executed a temporary quitclaim deed which conveyed the property to Chamberlin for the benefit of the assigned buyers, Gabovich and Harbison.

By January 24, 2004, escrow closed on the sale of the property to Gabovich and Harbison, and they received the deed to the property. In accordance with the terms of the agreement, respondent leased the property for a monthly rent of $2,300, which was less than her prior mortgage payments, and received an option to repurchase the property for a purchase price of $510,000, subject to the new loan obtained by Gabovich and Harbison. Appellants received repayment of the loan advances made to respondent, and a commission of $24,000.

Respondent failed to make rental payments as specified in the agreement, whereupon Gabovich and Harbison initiated unlawful detainer proceedings against her. On December 23, 2004, respondent filed an action against appellants, Gabovich and Harbison for breach of fiduciary duty, fraud, conspiracy to commit fraud, and violations

[1] Chamberlin is included as a named party in the first notice of appeal (A116327) filed on December 11, 2006, but not in the second notice of appeal (A118824) filed by Krug alone, and Chamberlin has not filed a brief on appeal. Despite the omission of Chamberlin as a named appellant in the second notice of appeal and his failure to file a brief, he remains a party to the first appeal, and the appeals have been consolidated. We will refer to Krug and Chamberlin collectively as appellants; we will refer to them individually by their last names.

of the Home Equity Sales Contracts Act and the Mortgage Foreclosure Consultant Act (the Acts). Respondent sought damages, rescission, declaratory and injunctive relief.

On March 25, 2005, appellants, through their attorney Elizabeth Reifler, filed answers to the complaint and a cross-complaint against respondent, Gabovich and Harbison for fraud, misrepresentation, defamation, and comparative indemnity. After respondent twice demurred to the action against her, a first and then a second amended cross-complaint were filed by appellants, the latter on September 13, 2005. Defendants Gabovich and Harbison also filed a cross-complaint against appellants, which was served upon Reifler in August of 2005.

Respondent settled her action against Gabovich and Harbison, and sought to obtain a good faith settlement determination (Code Civ. Proc., § 877.6). The trial court subsequently sustained the objection of appellants and declined to approve the settlement agreement. The parties were ordered to proceed to mediation, and the case was set for trial on April 24, 2006.

Respondent filed a motion for summary adjudication of her statutory claims brought pursuant to the Acts on October 21, 2005. She sought damages from appellants in the total amount of $477,688.90, plus reasonable attorney fees and costs.

While Reifler continued to represent appellants in the action, but before any opposition to the motion for summary adjudication was filed, she resolved an unrelated disciplinary proceeding brought against her by the State Bar for repeated failure to competently perform legal services for a client. In September of 2005, Reifler agreed to accept public reproval from the State Bar and a two-year period of probation, with specified conditions, among them: to retain the assistance of an attorney or clerical services as necessary to assure her coverage of litigation and other practice matters; and to comply with her Lawyer Assistance Program Participation Agreement. Reifler designated Andrew Alger as the attorney to provide legal assistance services to her pursuant to the condition of her probation. Appellants were not aware of the discipline imposed upon Reifler by the State Bar or the condition that she "was not allowed to practice law without associating an attorney and/or clerical staff."

Reifler did not enlist the services of Andrew Alger or any clerical staff to assist her with appellants' case. She also repeatedly failed to timely file opposition papers and responses to discovery requests during the course of the proceeding.

On December 22, 2005, respondent's counsel granted Reifler's request for an extension of time until January 6, 2006, to file opposition to respondent's summary adjudication motion. The hearing date on the motion was continued from January 9, to January 30, 2006. Reifler requested another extension of time to file opposition on January 5, 2006, for reasons that included flood damage to her home and office, associated recurring power outages, her husband's terminal illness and related disability, and her own illness and deteriorating mental state that inhibited her performance of legal services for appellants. Respondent's counsel agreed to grant Reifler a further extension only on the condition that she sign a stipulation for entry of a judgment against appellants if the opposition was not filed by January 20, 2006. Reifler advised Krug that the proposed stipulation, onerous as it was, should be signed to avoid a judgment in favor of respondent "by default" on the summary adjudication motion related to the first and second causes of action. Krug told Reifler to "do whatever [she] needed to do."

Reifler drafted and signed a stipulation on January 6, 2006, which did not specify any "dollar amount" of the judgment in favor of respondent in the event opposition was not filed by the extended due date. Respondent's counsel sent to Reifler a form of judgment to be attached as Exhibit 1 to the stipulation, which specified the "exact amount of the judgment," $477,688.90, plus reasonable attorney fees and costs. Reifler signed the stipulation and filed it with the court, but claimed that due to her impaired state of mind she neither reviewed the amount of the judgment stated in the exhibit nor agreed to it. The stipulation provided that if appellants "fail to file their opposition to Plaintiff's Motion for Summary Adjudication of Issues by January 20, 2006, Plaintiff shall be entitled to judgment on the issues addressed in that motion, in the form attached as Exhibit 1 hereto."

Krug did not examine the stipulation or the judgment, and was not aware of its terms. He had no knowledge of the $477,688.90 amount of judgment agreed to by

Reifler, and did not give her authority to stipulate to judgment in that amount. Chamberlin was never contacted about the stipulation and had no knowledge of it.

Reifler failed to file opposition to the motion for summary adjudication by the stipulated January 20, 2006 deadline. On January 24, 2006, respondent applied ex parte to enter the stipulated judgment. Reifler contested the entry of judgment by filing a declaration in which she recited the reasons for her failure to timely file the opposition, and maintained that the opposition had by then been completed. On January 24, 2006, the trial court entered judgment in favor of respondent on the first two causes of action of her complaint in accordance with the stipulation. The judgment was filed and served upon Reifler the next day.

Still pending was the remainder of the action, which included: a second motion for summary adjudication of the fraud and negligent misrepresentation causes of action of the cross-complaint filed against respondent by appellants; the cross-complaint filed by Gabovich and Harbison against appellants; the cross-complaint of appellants against Gabovich and Harbison; and the additional causes of action of respondent's complaint against appellants.

Reifler's husband died on January 31, 2006, and she became seriously ill with a respiratory infection and depression. Thereafter, she failed to afford any representation to appellants in the case: she cancelled a scheduled mediation; she filed no opposition to respondent's second summary adjudication motion; she did not appear at a mandatory settlement conference scheduled for April 7, 2006, or file a settlement conference statement; she did not file an answer to the cross-complaint of Gabovich and Harbison against appellants; she did not appear at a trial scheduled for April 24, 2006; she did not prosecute the cross-complaint of appellants against Gabovich and Harbison; she did not appear at a hearing on respondent's request for an award of attorney fees from appellants. Reifler also ceased communicating with her clients. Appellants were not aware of Reifler's failure to take any action on their behalf in the proceedings.

The case thus proceeded to entry of a series of judgments against appellants, all without their knowledge or any participation by their attorney. After a hearing on March

21, 2006, without opposition the trial court granted respondent's motion for summary adjudication of the first and second causes of action for fraud and negligent misrepresentation alleged in appellants' cross-complaint, based on lack of any evidence of recoverable damages.[2] A default judgment was also entered against appellants on the cross-complaint filed by Gabovich and Harbison.

Following a "prove-up" hearing on April 24, 2006, at which neither appellants nor Reifler appeared, the court found that appellants committed fraud and breached their fiduciary duties to respondent under the Acts in connection with the agreement. Judgment was thus entered in favor of respondent on the third and fourth causes of action of her complaint "in the same amount as the judgment" entered against appellants on January 24, 2006, $477,688.90, plus reasonable attorney fees and costs.[3] The "cross-claims" of appellants against respondent for comparative indemnity, equitable indemnity and contribution (the fourth, fifth and sixth causes of action of the cross-complaint against respondent) were dismissed with prejudice on respondent's motion. Judgment was entered in favor of Gabovich and Harbison on their cross-complaint against appellants in the amount of $158,125.71. Appellants' cross-complaint against Gabovich and Harbison was dismissed for failure to prosecute. After an uncontested hearing the court also entered an order on May 11, 2006, that awarded respondent attorney fees from appellants in the amount of $85,000.

A "Final Judgment" in favor of respondent and against appellants in the amount of $477,688.90, plus reasonable attorney fees and costs, was filed on May 12, 2006. Following the entry of default against appellants, judgment in favor of Gabovich and Harbison in the amount of $158,125.71 was entered on May 18, 2006.

Appellants, after learning of the judgment in favor of respondent when liens were placed on their property, obtained new counsel and filed a motion on June 15, 2006, to

[2] The order was filed on April 25, 2006.

[3] The prior stipulated judgment was on the first and second causes of action of the complaint.

set aside the judgments pursuant to Code of Civil Procedure section 473.[4] The trial court found that the facts presented did not establish that appellants were entitled to relief from the judgment under either the mandatory or discretionary provisions of section 473. The court thus denied the motion to set aside the judgments on October 13, 2006. The first appeal (A116327) was filed from the denial of the motion for relief from default on December 11, 2006.

While the first appeal was pending, appellants moved to set aside the judgments as void on May 15, 2007. Appellants claimed the judgments in favor of respondent and Gabovich and Harbison were void on three grounds: their attorney Reifler was practicing law without a valid license; the entry of the stipulation to a $477,688.90 judgment by their counsel was in excess of her authority; the default judgment in favor of Gabovich and Harbison exceeded the prayer for damages. After a hearing, the trial court denied the motion as to the $477,688.90 judgment in favor of respondent. The motion to vacate the judgment in favor of Gabovich and Harbison was granted in part and denied in part: the award of prejudgment interest in the amount of $10,452.87 was stricken, and the amount of the judgment was modified from $158,125.71 to $147,672.84. The second appeal before us followed the entry of the amended judgment.[5]

DISCUSSION

I. The Jurisdiction of the Trial Court to Rule on the Second Motion to Vacate the Judgments.

We commence our review by considering the jurisdiction of the trial court to rule on appellants' second motion to vacate the judgments, which was filed on May 16, 2007, while the first appeal was pending.[6] The trial court's ruling on the motion runs headlong into a potential jurisdictional obstacle. "The general rule is that ' " '[t]he filing of a valid notice of appeal vests jurisdiction of the cause in the appellate court until determination

[4] All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

[5] The appeals have been consolidated by order of this court.

[6] We requested that the parties submit supplemental briefing on this issue, and they have done so.

of the appeal and issuance of the remittitur' [citation], thereby divesting the trial court of jurisdiction over anything affecting the judgment. [Citations.]" ' [Citations.]" (*People v. Superior Court* (*Gregory*) (2005) 129 Cal.App.4th 324, 329, italics omitted; see also *People v. Flores* (2003) 30 Cal.4th 1059, 1064; *Bellows v. Aliquot Associates, Inc*. (1994) 25 Cal.App.4th 426, 433; *Andrisani v. Saugus Colony Limited* (1992) 8 Cal.App.4th 517, 523.) Section 916 specifically provides that " 'the trial court is divested of' subject matter jurisdiction over any matter embraced in or affected by the appeal during the pendency of that appeal. [Citation.] 'The effect of the appeal is to remove the subject matter of the order from the jurisdiction of the lower court . . . .' [Citation.] Thus, 'that court is without power to proceed further as to any matter embraced therein until the appeal is determined.' [Citations.]" (*Varian Medical Systems, Inc. v. Delfino* (2005) 35 Cal.4th 180, 196–197, fn. omitted.)[7]

" 'The purpose of the rule depriving the trial court of jurisdiction in a case during a pending appeal is to protect the appellate court's jurisdiction by preserving the status quo until the appeal is decided. The rule prevents the trial court from rendering an appeal futile by altering the appealed judgment . . . by conducting other proceedings that may affect it.' [Citation.]" (*Townsel v. Superior Court* (1999) 20 Cal.4th 1084, 1089.) "If trial court proceedings during the pendency of the appeal are consistent with the reviewing court's resolution of the appeal, then the appeal is, in effect, futile because the trial court has already granted the relief that would have been granted on appeal. And if trial court proceedings during the pendency of the appeal conflict with the reviewing court's resolution of the appeal, then the appeal will likely be futile because the prevailing party, in most instances, will have no adequate remedy left. Because 'the

[7] "Section 916, subdivision (a) states: 'Except as provided in Sections 917.1 to 917.9, inclusive, and in Section 116.810 [none of which are applicable], the perfecting of an appeal stays proceedings in the trial court upon the judgment or order appealed from or upon the matters embraced therein or affected thereby, including enforcement of the judgment or order, but the trial court may proceed upon any other matter embraced in the action and not affected by the judgment or order.' " (*Mattel, Inc. v. Luce, Forward, Hamilton & Scripps* (2002) 99 Cal.App.4th 1179, 1189.)

remedy by appeal cannot be denied to an aggrieved party dissatisfied with the judgment or the order appealed from by an act of the trial court in the action, at the behest or on the motion of the respondent, after an appeal has been taken and is pending' [citation], the automatic stay under section 916 must divest the trial court of fundamental jurisdiction over the matters embraced in or affected by the appeal [citation]." (*Varian Medical Systems, Inc. v. Delfino, supra*, 35 Cal.4th 180, 198–199, italics omitted.)

Here, a ruling on the second motion to vacate the judgments patently affects the appeal from the ruling on the first motion to vacate. (See *In re Marriage of Varner* (1998) 68 Cal.App.4th 932, 937; *Betz v. Pankow* (1993) 16 Cal.App.4th 931, 940.) Thus, under the general rule, the trial court lost jurisdiction to materially modify or vacate the judgments after appellants filed the first notice of appeal from the denial of the motion for relief from default in December of 2006. (*Laidlaw Waste Systems, Inc. v. Bay Cities Services, Inc*. (1996) 43 Cal.App.4th 630, 641.) "Because an appeal divests the trial court of subject matter jurisdiction, the court lacks jurisdiction to vacate the judgment or make any order affecting it. [Citations.] Thus, action by the trial court while an appeal is pending is null and void." (*People v. Alanis* (2008) 158 Cal.App.4th 1467, 1472–1473.)

However, the general rule that the filing of a notice of appeal prevents the trial court from taking further substantive action on that cause or making orders affecting the judgment until the appeal is resolved is subject to exceptions. (*Townsel v. Superior Court, supra,* 20 Cal.4th 1084, 1089–1090.) One recognized exception, and the only one pertinent here, "is that, notwithstanding the pendency of an appeal, '[t]he trial court is allowed to vacate a void—but not voidable—judgment.' [Citations.] However, '[a] judgment is void rather than voidable *only* if the trial court lacked subject matter jurisdiction. [Citation.]' [Citation.]" (*People v. Alanis, supra*, 158 Cal.App.4th 1467, 1473.) "A void judgment or order may be disregarded by the parties and the trial court, and may be set aside by the trial court on its own motion, despite the pendency of an appeal." (*Betz v. Pankow, supra,* 16 Cal.App.4th 931, 938.) " ' "[A] court may set aside a void order at any time. An appeal will not prevent the court from at any time lopping off what has been termed a dead limb on the judicial tree—a void order." [Citations.]'

[Citation.]" (*Andrisani v. Saugus Colony Limited, supra*, 8 Cal.App.4th 517, 523.) "If the judgment is void, it is subject to collateral attack by means of a postjudgment motion to vacate or set aside the judgment as void. [Citations.] An order denying such a motion is a special order made after entry of judgment that may be directly attacked on appeal. [Citations.] This appeal is allowed because an order giving effect to a void judgment is also void and appealable." (*Residents for Adequate Water v. Redwood Valley County Water Dist.* (1995) 34 Cal.App.4th 1801, 1805.)

In contrast, "a judgment which is merely voidable can only be attacked in the court having subject matter jurisdiction." (*Betz v. Pankow, supra*, 16 Cal.App.4th 931, 938.) "The distinction is important when dealing with a final judgment, because 'a party seeking to set aside a voidable judgment or order must act to set aside the order or judgment before the matter becomes final' [citation], whereas describing the judgment as void—meaning the court lacks subject matter jurisdiction—suggests that the judgment is subject 'to collateral attack at any time,' a result Witkin accurately describes as 'highly undesirable' [2 Witkin, Cal. Procedure (4th ed. 1996) Courts, § 93, p. 131]." (*North Beverly Park Homeowners Assn. v. Bisno* (2007) 147 Cal.App.4th 762, 769, italics omitted.)

" ' "Lack of jurisdiction in its most fundamental or strict sense means an entire absence of power to hear or determine the case, an absence of authority over the subject matter or the parties." ' [Citations.] 'When a court lacks jurisdiction in a fundamental sense, an ensuing judgment is void, and "thus vulnerable to direct or collateral attack at any time." ' [Citations.] [¶] The second type of jurisdictional error occurs when the court has jurisdiction over the subject matter and the parties in the fundamental sense, but ' "it has no 'jurisdiction' (or power) to act except in a particular manner, or to give certain kinds of relief, or to act without the occurrence of certain procedural prerequisites." ' [Citations.]" (*People v. Amwest Surety Ins. Co.* (2004) 125 Cal.App.4th 547, 552.) " 'When a court has fundamental jurisdiction, but acts in excess of its jurisdiction, its act or judgment is merely voidable. [Citations.] That is, its act or judgment is valid until it is set aside, and a party may be precluded from setting it aside

by "principles of estoppel, disfavor of collateral attack or res judicata." [Citation.] Errors which are merely in excess of jurisdiction should be challenged directly, for example by motion to vacate the judgment, or on appeal, and are generally not subject to collateral attack once the judgment is final unless "unusual circumstances were present which prevented an earlier and more appropriate attack." [Citations.]' [Citation.]" (*County of Los Angeles v. Harco National Ins. Co.* (2006) 144 Cal.App.4th 656, 662.)

Accordingly, once the first appeal was filed, this court obtained jurisdiction of the case and the *trial court* was precluded from resolving any claims other than those that sought to set aside the prior judgment as void. (*Betz v. Pankow, supra,* 16 Cal.App.4th 931, 938.) The trial court had no jurisdiction to act in any other capacity while the first appeal was pending, and any such proceedings " 'are a nullity.' " (*Varian Medical Systems, Inc. v. Delfino, supra*, 35 Cal.4th 180, 197.)

II. The Authority of Appellant's Counsel to Stipulate to Judgment Against Appellant in the Amount of $477,688.90.

Appellants renew the argument that the stipulated judgment in favor of respondent in the amount of $477,688.90 is void for lack of the authority of their counsel, Reifler, to enter into the stipulation. In addition, they urge that the order is invalid due to Reifler's practice of law "without a mentor" in violation of her probationary license. We first confront appellants' claim that they "never authorized" Reifler to stipulate to a $477,688.90 judgment against them. Appellants add that the judgment also required evidence of their written consent filed with the clerk or entered in the court minutes (§ 283), which does not appear in the record. They ask us to vacate the judgment as void. If we find the stipulated judgment void, the trial court had authority to set it aside despite the prior appeal.

This contention requires us to examine the "issue of an attorney's authority to bind his client by agreement or stipulation." (*Knabe v. Brister* (2007) 154 Cal.App.4th 1316, 1323.) " ' "A stipulation in proper form is binding upon the parties if it is within the authority of the attorneys." ' [Citation.]" (*Mileikowsky v. Tenet Healthsystem* (2005) 128 Cal.App.4th 262, 279.) "As a general proposition the attorney-client relationship, insofar

as it concerns the authority of the attorney to bind his client by agreement or stipulation, is governed by the principles of agency." (*Blanton v. Womancare, Inc*. (1985) 38 Cal.3d 396, 403.) The " ' "the client as principal is bound by the acts of the attorney-agent within the scope of his actual authority (express or implied) or his apparent or ostensible authority; or by unauthorized acts ratified by the client." . . .' [Citation.]" (*Channel Lumber Co. v. Porter Simon* (2000) 78 Cal.App.4th 1222, 1230; see also *NORCAL Mutual Ins. Co. v. Newton* (2000) 84 Cal.App.4th 64, 78.)

" 'The authority . . . conferred upon an attorney is in part apparent authority . . . to do that which attorneys are normally authorized to do in the course of litigation . . . and in part actual authority . . .' either express or implied. [Citation.]" (*CPI Builders, Inc. v. Impco Technologies, Inc*. (2001) 94 Cal.App.4th 1167, 1172.) Section 283, subdivision 1 declares an attorney has authority "[t]o bind his client in any of the steps of an action or proceeding by his agreement filed with the clerk, or entered upon the minutes of the court, and not otherwise . . . ." "Therefore, '[t]he attorney is authorized by virtue of his employment to bind the client in procedural matters arising during the course of the action . . . . [Citations.] . . . "In retaining counsel for the prosecution or defense of a suit, the right to do many acts in respect to the cause is embraced as ancillary, or incidental to the general authority conferred, and among these is included the authority to enter into stipulations and agreements in all matters of procedure during the progress of the trial. Stipulations thus made, so far as they are simply necessary or incidental to the management of the suit, and which affect only the procedure or remedy as distinguished from the cause of action itself, and the essential rights of the client, are binding on the client." ' [Citation.]" (*Stewart v. Preston Pipeline Inc*. (2005) 134 Cal.App.4th 1565, 1581; see also *Mileikowsky v. Tenet Healthsystem, supra,* 128 Cal.App.4th 262, 279.)

"By contrast, there are other stipulations or actions taken in a lawsuit that must be viewed as 'impair[ing] the client's substantial rights or the cause of action itself.' [Citation.] In those instances, there is no implicit authority conferred upon counsel simply by virtue of the attorney-client relationship [citation], and the attorney's agreement or action is valid only with his or her client's express authorization or

agreement." (*Stewart v. Preston Pipeline Inc., supra,* 134 Cal.App.4th 1565, 1582; see also *Blanton v. Womancare, Inc., supra,* 38 Cal.3d 396, 404.) "[T]he courts draw a distinction between actions which bind the client in procedural matters arising during the course of the action and those which impair the client's substantial rights or the cause of action itself." (*City of Fresno v. Baboian* (1975) 52 Cal.App.3d 753, 757.)

"The Supreme Court has not expressly defined what a substantial right is, but it has provided examples." (*Knabe v. Brister, supra,* 154 Cal.App.4th 1316, 1324.) "The court recognized a number of areas where there could be no presumption of authority to act for the client: ' "[The attorney] has no implied or ostensible authority to bind his client to a compromise settlement of pending litigation[, . . ." '] . . . may not 'stipulate to a matter which would eliminate an essential defense[,] . . . *agree to the entry of a default judgment*[,] . . . stipulate that only nominal damages may be awarded[,] . . . *agree to an increase in the amount of the judgment against his client*[,] . . . waive findings so that no appeal can be made[, or] . . . dismiss [a] cross-complaint[.]' [Citation.]" (*Lazarus v. Titmus* (1998) 64 Cal.App.4th 1242, 1248, italics added.) "An attorney who takes these types of acts without his client's consent 'impairs so substantial a portion of the case or so fundamental a right of the client that it justifies setting aside a stipulation at the expense of an opposing party with no knowledge and/or reason to know of the lawyer's lack of authority.' [Citation.]" (*Knabe v. Brister, supra,* at p. 1324.)

Here, appellants' attorney, after her persistent failure to act on her clients' behalf and faced with another impending deadline which she apparently was unable to meet, agreed to stipulate to a judgment in favor of respondent – in essence a default judgment – if she failed once again to file opposition to respondent's summary adjudication motion by the date of the continuance granted to her. Reifler did not merely engage in a strategic decision in conjunction with her clients as to the management of the summary judgment motion. She essentially agreed to a conditional default judgment, then unilaterally failed to meet the condition that would have avoided it. The result was a stipulated judgment against her clients that impaired their substantial rights. The agreement for entry of judgment was not within the implicit authority granted to Reifler by virtue of her

employment as appellants' counsel. (*Levy v. Superior Court* (1995) 10 Cal.4th 578, 583; *Blanton v. Womancare, Inc., supra,* 38 Cal.3d 396, 404–405; *Stewart v. Preston Pipeline Inc., supra,* 134 Cal.App.4th 1565, 1582; *Lazarus v. Titmus, supra,* 64 Cal.App.4th 1242, 1248.) Absent express authority, an attorney does not have implied plenary authority to enter into agreements for disposition of a suit on behalf of a client. (*Blanton v. Womancare, Inc., supra,* at p. 407; *CPI Builders, Inc. v. Impco Technologies, Inc., supra,* 94 Cal.App.4th 1167, 1172.) " ' "[T]he law is well settled that an attorney must be *specifically authorized* to settle and compromise a claim, that merely on the basis of his employment he has no implied or ostensible authority to bind his client to a compromise settlement of pending litigation." ' [Citations.]" (*Murphy v. Padilla* (1996) 42 Cal.App.4th 707, 717, italics added.)

The remaining question is whether appellants *expressly* authorized the entry of judgment against them. We conclude that while Krug granted Reifler authority to "do whatever [she] needed to do" to obtain a continuance to file opposition to the summary adjudication motion, she was not given either written or oral authority to stipulate to a $477,688.90 judgment against them. Krug was told by Reifler that failure to file timely opposition would result in "granting the motion by default" and consequent judgment against him on two causes of action of respondent's complaint. Krug was not advised that Reifler had agreed to a $477,688.90 judgment if she failed to file the opposition. Even Reifler was unaware of the amount of the stipulated judgment until she subsequently received the proposed form of judgment from respondent's attorney, at the earliest.[8] Reifler asserted that she did not agree to the amount of the stipulated judgment, and was not authorized by her clients to enter into a stipulation for a judgment in the $477,688.90 amount. She did not then, or ever, inform her clients of the amount of the stipulated judgment. Chamberlin, in fact, was never notified of "any stipulation" by Reifler or judgment in the case.

[8] Reifler asserted in her declaration that she did not read the proposed form of judgment before she signed it, and learned of the amount later.

On the record before us we cannot find that appellants expressly agreed to such an excessive judgment – in excess of the purchase price of the property – absent disclosure of its details. (*Blanton v. Womancare, Inc., supra,* 38 Cal.3d 396, 404.) The requirement of direct participation and express authority from the client to an agreement for judgment is imposed to ensure that the disposition of a case is the product of " 'mature reflection and deliberate assent. This protects the parties against hasty and improvident settlement agreements by impressing upon them the seriousness and finality of the decision . . . .' [Citation.]" (*Elnekave v. Via Dolce Homeowners Assn.* (2006) 142 Cal.App.4th 1193, 1198; *Fiege v. Cooke* (2004) 125 Cal.App.4th 1350, 1354; *Murphy v. Padilla, supra,* 42 Cal.App.4th 707, 716.) " 'It also protects parties from impairment of their substantial rights without their knowledge and consent.' [Citation.]" (*Irvine v. Regents of the University of California* (2007) 149 Cal.App.4th 994, 1001; see also *Gauss v. GAF Corp*. (2002) 103 Cal.App.4th 1110, 1118.)

We further find that appellants did not ratify their attorney's agreement. Krug was not aware of the specific terms of the stipulation until he later learned from Chamberlin that judgment liens had been filed against them. Chamberlin had no knowledge of the stipulation at all. Upon discovery by appellants of the existence of the $477,688.90 judgment, they acted promptly to disavow it and seek to set it aside. Appellants neither freely and knowingly assented to the terms of the stipulated judgment nor ratified the attorneys' agreement. (*Sanker v. Brown* (1985) 167 Cal.App.3d 1144, 1146–1147.)

We conclude that the stipulated judgment in favor of respondent is void for lack of implied or express authority on the part of appellants' counsel to enter into the stipulation. (*City of Fresno v. Baboian, supra,* 52 Cal.App.3d 753, 758; *Smith v. Sleepy Hollow Inv. Co.* (1944) 65 Cal.App.2d 75, 80.) "An attorney's unauthorized disposition of clients' substantive rights is invalid and a judgment based thereon is therefore void." (*Romadka v. Hoge* (1991) 232 Cal.App.3d 1231, 1236.)

As a void judgment, even one entered upon a stipulation, it is subject to direct or collateral attack at any time without a showing of a meritorious defense. (See *Estate of Estrem* (1940) 16 Cal.2d 563, 572; *Heidary v. Yadollahi* (2002) 99 Cal.App.4th 857, 862;

Fidelity Creditor Service, Inc. v. Browne (2001) 89 Cal.App.4th 195, 206–207; *Plaza Hollister Ltd. Partnership v. County of San Benito* (1999) 72 Cal.App.4th 1, 20; *Rochin v. Pat Johnson Manufacturing Co*. (1998) 67 Cal.App.4th 1228, 1239; *Molen v. Friedman* (1998) 64 Cal.App.4th 1149, 1156; *Estate of Buck* (1994) 29 Cal.App.4th 1846, 1854; *Romadka v. Hoge, supra,* 232 Cal.App.3d 1231, 1236; *City of Glendale v. George* (1989) 208 Cal.App.3d 1394, 1397–1398; *Donel, Inc. v. Badalian* (1978) 87 Cal.App.3d 327, 334–335.) Entry of judgment on a "cause of action by an attorney acting without any authority from his client is an act beyond the scope of his authority which, on proper proof, may be vacated at any time." (*Whittier Union High Sch. Dist. v. Superior Court* (1977) 66 Cal.App.3d 504, 509.) Indeed, section 473, subdivision (d), also contains a separate provision that specifically grants authority to the court "to set aside a void judgment without any mention of a time limit." (*Heidary v. Yadollahi, supra,* at p. 862; *Sindler v. Brennan* (2003) 105 Cal.App.4th 1350, 1353.)[9] "Section 473, subdivision (d), authorizes the trial court to 'set aside any void judgment or order' upon a noticed motion. [Citation.] The motion may be made at any time. [Citations.] It is immaterial how the invalidity is called to the court's attention." (*Schwab v. Southern California Gas Co*. (2004) 114 Cal.App.4th 1308, 1320.) A void judgment is also "a nullity" which may be vacated pursuant the "inherent power" of the court. (*Olivera v. Grace* (1942) 19 Cal.2d 570, 574; *Rochin v. Pat Johnson Manufacturing Co., supra,* 67 Cal.App.4th 1228, 1239.) In addition, any prejudice to respondent "is not a factor" when the judgment is void. (*Sindler v. Brennan, supra,* at p. 1354; see also *Sugimoto v. Exportadora de Sal, S.A. de C.V*. (1991) 233 Cal.App.3d 165, 170.)

Even if we were to declare the stipulated judgment merely voidable rather than void,[10] "the result would be the same. The difference between a void judgment and a

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[9] Section 473, subdivision (d) reads in full: "The court may, upon motion of the injured party, or its own motion, correct clerical mistakes in its judgment or orders as entered, so as to conform to the judgment or order directed, and may, on motion of either party after notice to the other party, *set aside any void judgment or order*." (Italics added.)

[10] Although an attorney's stipulation to disposition of a case has been declared to be a "void" judgment (*Romadka v. Hoge, supra,* 232 Cal.App.3d 1231, 1236), we recognize that the trial

voidable one is that a party seeking to set aside a voidable judgment or order must act to set aside the order or judgment before the matter becomes final." (*Christie v. City of El Centro* (2006) 135 Cal.App.4th 767, 780.) Appellants still acted timely in moving to set aside the judgment, but merely addressed the request for relief to the wrong court. (See *Betz v. Pankow, supra*, 16 Cal.App.4th 931, 941; *Whittier Union High Sch. Dist. v. Superior Court, supra*, 66 Cal.App.3d 504, 507–508.) And, when a trial court has fundamental jurisdiction, but acts in excess of its jurisdiction, as it did here by entering a stipulated judgment that exceeded the authority of appellants' counsel, the error may be challenged directly *or on appeal*. (*People v. American Contractors Indemnity Co*. (2004) 33 Cal.4th 653, 661; *People v. Tindall* (2000) 24 Cal.4th 767, 776; *County of Los Angeles v. Harco National Ins. Co., supra*, 144 Cal.App.4th 656, 662.) "If jurisdictional error has occurred, the resulting judgment or order is 'voidable and reversible on appeal even where, as here, it is clear from the record [that no prejudice resulted].' [Citation.]" (*In re Marriage of Jackson* (2006) 136 Cal.App.4th 980, 997.) The objective of judicial economy and the interest of the parties in resolution of the dispute between them are not served if this court, having jurisdiction over the matter, declines to finally address the validity of the stipulated judgment here, and instead remands the case to the trial court for yet another motion to set aside the judgment by appellants—and perhaps another appeal. We therefore conclude that the judgment in favor of appellants in the amount of $477,688.90, plus reasonable attorney fees and costs, must be set aside in its entirety.[11]

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court had subject matter jurisdiction over the cause, so in a jurisdictional sense the stipulated judgment was at least not void on its face. (*People v. Alanis, supra*, 158 Cal.App.4th 1467, 1473.)

[11] In light of our conclusion that judgment pursuant to the stipulation must be vacated as void for lack of implied or express authority of appellant's attorney to agree to it, we need not reach appellant's additional challenges to the judgment under the mandatory and discretion provisions of section 473. The subsequent order awarding attorney fees must also be vacated with the judgment upon which it is based.

III. Mandatory Relief from the Default Judgment in Favor of Gabovich and Harbison.

We turn to the default judgment in the amount of $158,125.71 entered against appellants on the cross-complaint filed by Gabovich and Harbison. The record shows that Gabovich and Harbison filed and served the cross-complaint upon Reifler in August of 2005. The cross-complaint requested damages "in excess of $135,000." Reifler never filed an answer or other pleading on behalf of appellants. In April of 2006, when Gabovich and Harbison sought to obtain a default judgment on the cross-complaint, Reifler failed to submit opposition or seek to file an answer. She also did not appear at the hearing to contest entry of judgment, and did not inform appellants that a request for default judgment was pending. In her declaration filed in support of the motion to set aside the judgments, Reifler asserted that due to her own illness and the death of her husband in late-January of 2006, she was totally inattentive to the case thereafter. She failed to communicate at all with her clients after January of 2006. The default judgment on the cross-complaint was entered in May of 2006 without appellants' knowledge.

Appellants argue that they are entitled to relief under the mandatory provisions of section 473, based upon their attorney's declaration of neglect. They also maintain that Reifler's "positive misconduct" in handling the case justifies setting aside the default judgment under the discretionary provisions of section 473. In addition, they claim that Reifler's practice of law "without a mentor" in violation of her probationary license renders the judgments "void." Finally, they challenge the amount of the default judgment as in excess of the amount requested in the pleading.[12] We resolve this contention by finding that the judgment on the cross-complaint must be set aside under section 473.

"Section 473(b) has two parts. The first allows the trial court 'upon any terms as may be just,' to 'relieve a party or his or her legal representative from a judgment, dismissal, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or *excusable* neglect.' . . . Whether or not to grant this type of

[12] We observe that Gabovich and Harbison have not submitted any opposition brief in this appeal, and respondent Ford has not expressed any position on the propriety of the default judgment in their favor on the cross-complaint.

relief is discretionary with the court." (*Jerry's Shell v. Equilon Enterprises, LLC* (2005) 134 Cal.App.4th 1058, 1069.) "In the 'mandatory provisions,' section 473 further provides that 'Notwithstanding any other requirements of this section, the court shall, whenever an application for relief is made no more than six months after entry of judgment, is in proper form, and is accompanied by an attorney's sworn affidavit attesting to his or her mistake, inadvertence, surprise, or neglect, vacate any (1) resulting default entered by clerk against his or her client, and which will result in entry of a default judgment, or (2) resulting default judgment or dismissal entered against his or her client, unless the court finds that the default or dismissal was not in fact caused by the attorney's mistake, inadvertence, surprise, or neglect.' " (*Avila v. Chua* (1997) 57 Cal.App.4th 860, 865–866.)

"The circumstances under which section 473(b) mandates relief are limited. Application for relief must be filed within six months of entry of judgment, be in proper form, and be accompanied by an attorney's sworn affidavit attesting to his or her mistake, inadvertence, surprise, or neglect. [Citation.] Once those requirements are met, the court must 'vacate any (1) resulting default entered by the clerk . . . which will result in entry of a default judgment, or (2) resulting default judgment or dismissal . . . , unless the court finds that the default or dismissal was not in fact caused by the attorney's mistake, inadvertence, surprise, or neglect.' [Citation.]" (*Vandermoon v. Sanwong* (2006) 142 Cal.App.4th 315, 320.) "To obtain relief under the mandatory provisions, 'plaintiffs' counsel need not show that his or her mistake, inadvertence, surprise or neglect was excusable. No reason need be given for the existence of one of these circumstances. Attestation that one of these reasons existed is sufficient to obtain relief, unless the trial court finds that the dismissal did not occur because of these reasons. [Citation.]' [Citation.]" (*Avila v. Chua, supra,* 57 Cal.App.4th 860, 868–869.)

" ' "[T]he provisions of section 473 of the Code of Civil Procedure are to be liberally construed and sound policy favors the determination of actions on their merits." [Citation.]' [Citation.] '[B]ecause the law strongly favors trial and disposition on the merits, any doubts in applying section 473 must be resolved in favor of the party seeking

relief from default.' [Citation.]" (*Maynard v. Brandon* (2005) 36 Cal.4th 364, 371–372.) Where, as here, the applicability of the mandatory relief provision does not turn on disputed facts and presents a pure question of law, our review is de novo. (*Leader v. Health Industries of America, Inc*. (2001) 89 Cal.App.4th 603, 612.)

We disagree with the trial court's determination section 473 required appellants to establish "excusable" neglect through Reifler's declaration to obtain relief. The court found that "this is a case of utterly inexcusable neglect," and the mandatory relief provisions of section 473 do not protect "attorneys from their own malpractice." The trial court thus mistakenly viewed the scope of the mandatory component of section 473. "The mandatory provision" of section 473 was added specifically "to provide relief to the client even when the attorney's mistake or neglect was not excusable. (Stats. 1991, ch. 1003, § 1[,] p. 4662.)" (*Garcia v. Hejmadi* (1997) 58 Cal.App.4th 674, 681.) "The attorney's mistake, inadvertence, surprise, or neglect need not be reasonable to justify mandatory relief. [Citation.] The purpose of the mandatory relief provision is to relieve the client of the burden caused by the attorney's error, impose a burden on the attorney instead, and avoid additional malpractice litigation." (*Matera v. McLeod* (2006) 145 Cal.App.4th 44, 63, fn. omitted.) Whether the neglect of counsel was excusable or inexcusable is of no consequence here; proof of neglect, surprise or inadvertence of any sort justifies mandatory relief. (*Avila v. Chua, supra,* 57 Cal.App.4th 860, 868–869.) The "*mandatory* relief provisions" of section 473 "*require* the court to grant relief if the attorney admits neglect, even if the neglect was *inexcusable*." (*Metropolitan Service Corp. v. Casa de Palms, Ltd*. (1995) 31 Cal.App.4th 1481, 1487.)

We further find that attorney neglect has been adequately established by appellants. The trial court focused upon respondent's complaint in finding that Reifler's declaration "does not attest to *any* neglect or mistake prior to January 5, 2006, but only thereafter." But at least as to the cross-complaint, we know that Reifler did not take even the slightest action at any time to file an answer or otherwise respond to the pleading. By the time Gabovich and Harbison sought a default in April of 2006, Reifler had ceased working on the case or communicating with her clients at all. Entry of default occurred

without any effort by Reifler to prevent it. Reifler's neglect in connection with the Gabovich and Harbison cross-complaint is palpable; doing nothing constitutes neglect. The remaining requirements of section 473 also having been met – the filing of the motion within six months after entry of judgment, an application in proper form, and the entry of a default judgment caused in fact by the attorney's neglect – appellants must be granted relief. (*Avila v. Chua, supra*, 57 Cal.App.4th 860, 869.) "If the prerequisites for the application of the mandatory relief provision of section 473, subdivision (b) exist, the trial court does not have discretion to refuse relief." (*SJP Limited Partnership v. City of Los Angeles* (2006) 136 Cal.App.4th 511, 516.)[13]

IV. Mandatory Relief from the Dismissal of Appellants' Cross-complaint against Gabovich and Harbison and the Cross-complaint of Appellants against Respondent.

For the same reasons, the dismissal of the cross-complaint of appellants against Gabovich and Harbison and the dismissal of the fourth, fifth and sixth causes of action of the cross-complaint of appellants against respondent must also be set aside. The mandatory provisions of section 473 apply to *dismissals* as well as default judgments. (*Vandermoon v. Sanwong, supra*, 142 Cal.App.4th 315, 320; *Prieto v. Loyola Marymount University* (2005) 132 Cal.App.4th 290, 296.) "The mandatory relief provision for attorney errors was extended to dismissals in 1992." (*Nacimiento Regional Water Management Advisory Com. v. Monterey County Water Resources Agency* (2004) 122 Cal.App.4th 961, 966–967.) " 'The purpose of this amendment was "to put dismissed plaintiffs on the same footing as defaulted defendants." [Citation.]' [Citation.]" (*Sprague v. County of San Diego* (2003) 106 Cal.App.4th 119, 133.) The relief afforded to a dismissed plaintiff is " 'comparable to the relief afforded a defaulting defendant.' " (*Jerry's Shell v. Equilon Enterprises, LLC, supra*, 134 Cal.App.4th 1058, 1070, citation omitted.)

[13] Again, in light of our conclusion we need not address appellants' remaining reasons for setting aside the judgment on the cross-complaint of Gabovich and Harbison.

The cross-complaint of appellants against Gabovich and Harbison and the fourth, fifth and sixth causes of action of the cross-complaint of appellants against respondent were dismissed by the trial court upon motions filed by the adverse parties that were totally unopposed by appellants. Those dispositions are thus "dismissals" within the express language of section 473, subdivision (b), and subject to the mandatory relief provisions of the statute. (See *Matera v. McLeod, supra*, 145 Cal.App.4th 44, 63–64.) " '[A] dismissal may be entered where a plaintiff fails to appear in opposition to a dismissal motion, and relief is afforded where that failure to appear is the fault of counsel.' . . . [Citation.]" (*English v. IKON Business Solutions, Inc*. (2001) 94 Cal.App.4th 130, 141.) "Thus, where a defendant was entitled to mandatory relief from a 'default' or 'default judgment' resulting from attorney mistake, inadvertence, surprise, or neglect, a plaintiff would be entitled to mandatory relief from a 'dismissal' resulting from similar circumstances." (*Id*. at p. 145.) The "mandatory provision of section 473(b)" reaches " 'dismissals which are procedurally equivalent to a default.' [Citation.]" (*Ibid;* see also *Leader v. Health Industries of America, Inc*., *supra*, 89 Cal.App.4th 603, 620.)

As with the default judgment in favor of Gabovich and Harbison, the dismissals of appellants' cross-complaint of appellants against Gabovich and Harbison and the fourth, fifth and sixth causes of action of the cross-complaint of appellants against respondent were the direct result of blatant neglect by appellants' counsel beginning in January of 2006. Pursuant to the mandatory relief provisions of section 473, those two judgments must also be set aside.

V. Appellants' Right to Discretionary Relief from the Remaining Orders Pursuant to Section 473.

We are left with two rulings by the trial court that do not fall within the definition of "defaults" or "dismissals" under section 473, subdivision (b): the judgment after a hearing in favor of respondent on the third and fourth causes of action of her complaint "in the same amount" as the prior stipulated judgment; and the summary adjudication of the first and second causes of action of appellants' cross-complaint in favor of respondent. (See *Matera v. McLeod*, *supra*, 145 Cal.App.4th 44, 64–65; *Huens v. Tatum*

(1997) 52 Cal.App.4th 259, 264–265.) Therefore, the provisions of section 473 that mandate relief based upon an attorney's declaration of fault do not apply to these judgments that are not the procedural equivalent of defaults or dismissals. (*Huh v. Wang* (2007) 158 Cal.App.4th 1406, 1417; *Prieto v. Loyola Marymount University, supra*, 132 Cal.App.4th 290, 295; *Leader v. Health Industries of America, Inc., supra,* 89 Cal.App.4th 603, 620; *Peltier v. McCloud River R.R. Co.* (1995) 34 Cal.App.4th 1809, 1817; *Ayala v. Southwest Leasing & Rental, Inc.* (1992) 7 Cal.App.4th 40, 43.) Appellants nevertheless claim that Reifler's "positive misconduct" during the course of her representation of them justifies setting aside both of these judgments pursuant to the discretionary provisions of section 473. They also repeat their argument that the judgments are void due to Reifler's practice of law without "qualification to practice" or "a mentor" as her probation condition required.

" 'The provision of section 473 which mandates relief from a judgment of dismissal or default when the motion is based on an attorney's affidavit of fault does not mandate relief from other judgments. In all other cases, relief is discretionary.' [Citation.] The pertinent provision of subdivision (b) of section 473 provides: 'The court may, upon any terms as may be just, relieve a party or his or her legal representative from a judgment, dismissal, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect.' " (*Generale Bank Nederland v. Eyes of the Beholder Ltd*. (1998) 61 Cal.App.4th 1384, 1399, citing *Garcia v. Hejmadi, supra,* 58 Cal.App.4th 674, 682.)

"To warrant discretionary relief here, the proffered evidence must show that the attorney's error was excusable." (*Huh v. Wang, supra,* 158 Cal.App.4th 1406, 1423.) " 'A party who seeks relief under section 473 on the basis of mistake or inadvertence of counsel must demonstrate that such mistake, inadvertence, or general neglect was excusable because the negligence of the attorney is imputed to his client and may not be offered by the latter as a basis for relief.' [Citation.] In determining whether the attorney's mistake or inadvertence was excusable, 'the court inquires whether "a reasonably prudent person under the same or similar circumstances" might have made the

same error.' [Citation.] In other words, the discretionary relief provision of section 473 only permits relief from attorney error 'fairly imputable to the client, i.e., mistakes anyone could have made.' [Citation.] 'Conduct falling below the professional standard of care, such as failure to timely object or to properly advance an argument, is not therefore excusable. To hold otherwise would be to eliminate the express statutory requirement of excusability and effectively eviscerate the concept of attorney malpractice.' [Citation.]" (*Zamora v. Clayborn Contracting Group, Inc.* (2002) 28 Cal.4th 249, 258, italics omitted.)

"It is clearly established that '[a] motion for relief under section 473 is addressed to the sound discretion of the trial court and an appellate court will not interfere unless there is a clear showing of an abuse.' [Citation.] The discretion conferred upon the trial court, however, is not a ' " 'capricious or arbitrary discretion, but an impartial discretion, guided and controlled in its exercise by fixed legal principles. It is not a mental discretion, to be exercised *ex gratia*, but a legal discretion, to be exercised in conformity with the spirit of the law and in a manner to subserve and not to impede or defeat the ends of substantial justice.' " [Citations.]' [Citation.] [¶] It is also the policy of the law to favor, whenever possible, a hearing on the merits. [Citation.] 'Appellate courts are much more disposed to affirm an order when the result is to compel a trial on the merits than when the default judgment is allowed to stand.' [Citation.] These policies favoring relief from default and deference to the trial court's exercise of discretion do not, however, 'transform appellate courts into mere spectators.' [Citation.] 'However strong the preference for a trial on the merits, there are limits to that preference and however great is trial court discretion, there are bounds to that discretion.' [Citation.]" (*Stafford v. Mach* (1998) 64 Cal.App.4th 1174, 1180–1181.)

We agree with respondent and the trial court that Reifler's conduct in the case was inexcusable. No reasonably prudent attorney would enter into a stipulation for an excessive judgment against her clients in the event opposition to a summary judgment was not filed by a specified date, then fail to file the opposition, then essentially cease all representation of the clients and decline to communicate with them. Reifler's failure to

discharge routine professional duties was not excusable. (*Generale Bank Nederland v. Eyes of the Beholder Ltd., supra*, 61 Cal.App.4th 1384, 1402.)

" 'Excepted from the rule' " that an attorney's inexcusable neglect is chargeable to the client, however, " 'are those instances in which the attorney's neglect is of that extreme degree amounting to positive misconduct, and the person seeking relief is relatively free from negligence; this exception is premised upon the concept the attorney's conduct, in effect, obliterates the existence of the attorney-client relationship. . . .' [Citation.]" (*Tustin Plaza Partnership v. Wehage* (1994) 27 Cal.App.4th 1557, 1563.) "Imputation of the attorney's neglect to the client ceases at the point where 'abandonment of the client appears.' [Citation.]" (*Seacall Development, Ltd. v. Santa Monica Rent Control Bd.* (1999) 73 Cal.App.4th 201, 205.)

"What constitutes 'abandonment' of the client depends on the facts in the particular action. Even where abandonment is shown, however, the courts also consider equitable factors in deciding whether the dismissal of an action should be set aside. These factors include the client's own conduct in pursuing and following up the case [citation], whether the defendant would be prejudiced by allowing the case to proceed [citation] and whether the dismissal was discretionary or mandatory [citation]. The courts must also balance the public policy favoring a trial on the merits against the public policies favoring finality of judgments and disfavoring unreasonable delays in litigation [citation] and the policy an innocent client should not have to suffer from its attorney's gross negligence against the policy a grossly incompetent attorney should not be relieved from the consequences of his or her incompetence." (*Seacall Development, Ltd. v. Santa Monica Rent Control Bd., supra*, 73 Cal.App.4th 201, 205.)

Reifler's conduct beginning in January of 2006 – it was hardly sterling even before then – reached the level of positive misconduct and abandonment. Her neglect of the case was unjustifiable and extreme. She continually failed to meet deadlines and obligations in the case. She declined to retain the assistance of an attorney or clerical services to assure her coverage of the litigation as required by a condition of her State Bar probation. Then, after entering into an unauthorized stipulation, she once more neglected

her professional duties, which caused an unreasonably harsh stipulated judgment to be entered against her clients without their knowledge. After that, she utterly deserted her clients. Communication with them ceased; all work on the case ceased. A scheduled mediation was cancelled, after which a series of motions and judgments occurred that went completely unopposed.[14] The record demonstrates a total absence of diligence that in effect amounted to abandonment of appellants' interests in the case. (*Shipley v. Sugita* (1996) 50 Cal.App.4th 320, 325–326; *Moss v. Stockdale, Peckham & Werner* (1996) 47 Cal.App.4th 494, 502–503.) Counsel's consistent and prolonged inaction was so visibly and inevitably disastrous that her clients were unknowingly deprived of representation. (*Moss v. Stockdale, Peckham & Werner, supra,* at p. 503.)

We further find that appellants were relatively free from personal neglect in the matter. Reifler admitted that she did not contact appellants to inform them of any of the actions and adverse judgments that ensued in the case. Appellants both asserted without dispute that due to Reifler's failure to contact them they remained unaware of the status of the litigation, and assumed the case had been postponed following the death of their attorney's husband. They also believed Reifler was continuing to represent them, an impression their attorney corroborated in her declaration. Given the circumstances, absent actual notice of their attorney's neglect appellants' inattentiveness to the case for a short period of four or five months was understandable and justifiable. (*Seacall Development, Ltd. v. Santa Monica Rent Control Bd., supra,* 73 Cal.App.4th 201, 206.) " 'Clients should not be forced to act as hawk-like inquisitors of their own counsel,

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[14] Respondent's counsel asserted at oral argument that Reifler represented appellants at a hearing on a motion to compel responses to discovery requests a week after the stipulated judgment was entered. The record in this regard is not definitive. The register of actions indicates that a hearing on respondent's motion occurred on January 30, 2006. No reference to Reifler's appearance on appellants' behalf at the hearing is mentioned, however, and the declaration of *respondent's counsel* in opposition to the motion to set aside the judgment states that no opposition to the motion was ever filed by appellants and that on "January 30, 2006, Ms. Reifler *failed to appear* to oppose the same motion." (Italics added.) In any event, Reifler's possible appearance at the hearing on the motion to compel discovery requests is inconsequential given her failure to take any other action to protect her clients' interests following entry of the stipulated judgment.

suspicious of every step and quick to switch lawyers.' [Citation.]" (*Fleming v. Gallegos* (1994) 23 Cal.App.4th 68, 74.)

"More significant than the client's failure to act before being put on notice of dismissal is the client's diligence after receiving notice." (*Seacall Development, Ltd. v. Santa Monica Rent Control Bd., supra,* 73 Cal.App.4th 201, 206, italics omitted.) Here, appellants learned of the stipulated judgment on April 22, 2006, and immediately contacted Reifler, who still did not tell them that any other proceedings in the case remained pending. Appellants thereafter managed to retain new counsel and file a motion to set aside the judgments by June 15, 2006. We find that appellants exercised reasonable diligence in moving for relief after discovering their attorney's neglect. (*Russell v. Dopp* (1995) 36 Cal.App.4th 765, 776.)

Finally, we are persuaded that the extreme damage suffered by appellants from their attorney's gross incompetence, and the public policy favoring a trial on the merits, far outweigh any prejudice to respondent that will result from allowing the case to proceed. (*Fleming v. Gallegos, supra,* 23 Cal.App.4th 68, 74–75.) To be sure, respondent will be inconvenienced by the relief granted to appellants, but according to the record she has not lost her home, and nothing suggests that the delay will harm her case. Moreover, to mitigate the financial harm to respondent we will direct the trial court to determine an appropriate award of legal fees and costs to compensate respondent, Gabovich and Harbison. (See *Matera v. McLeod, supra,* 145 Cal.App.4th 44, 68; *Garcia v. Hejmadi, supra,* 58 Cal.App.4th 674, 681; *Metropolitan Service Corp. v. Casa de Palms, Ltd., supra*, 31 Cal.App.4th 1481, 1489.) "Whenever relief is granted based on an attorney's affidavit of fault," subdivision (b) of section 473 specifies that "the court shall 'direct the attorney to pay reasonable compensatory legal fees and costs to opposing counsel or parties,' in addition to whatever additional fees are authorized by subdivision (c), of this section." (*J.A.T. Entertainment, Inc. v. Reed* (1998) 62 Cal.App.4th 1485,

1491.)[15] We therefore conclude that the trial court abused its discretion by denying appellants' motion to set aside the judgment in favor of respondent on the third and fourth causes of action of her complaint, and the summary adjudication of the first and second causes of action of appellants' cross-complaint in favor of respondent.

DISPOSITION

Accordingly, the denials of appellants' motions to set aside the judgments are reversed. All of the judgments entered against appellants and in favor of respondent and Gabovich and Harbison are reversed. On remand, the trial court is directed to impose reasonable compensatory legal fees and costs upon appellants' former attorney as required by the mandatory provisions of section 473, to consider in its discretion whether additional penalties or other relief authorized by section 473 should be granted, and to conduct other proceedings consistent with this opinion.[16] Costs on these two appeals are awarded to appellants. (*J.A.T. Entertainment, Inc. v. Reed, supra,* 62 Cal.App.4th 1485, 1495.)

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Swager, J.

We concur:

[15] "The mandatory provision" of section 473 states "that 'whenever relief is granted based on an attorney's affidavit of fault [the court shall] direct the attorney to pay reasonable compensatory legal fees and costs to opposing counsel or parties.' [Citation.]" (*Luri v. Greenwald* (2003) 107 Cal.App.4th 1119, 1124; see also *Carlson v. Department of Fish & Game* (1998) 68 Cal.App.4th 1268, 1282.) Section 473, subdivision (c) provides: "(1) Whenever the court grants relief from a default, default judgment, or dismissal based on any of the provisions of this section, the court may do any of the following: [¶] (A) Impose a penalty of no greater than one thousand dollars ($1,000) upon an offending attorney or party. [¶] (B) Direct that an offending attorney pay an amount no greater than one thousand dollars ($1,000) to the State Bar Client Security Fund. [¶] (C) Grant other relief as is appropriate."

[16] An award of legal fees and costs may *not* include those attributable to the void judgment entered upon the stipulation.

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Stein, Acting P. J.

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Margulies, J.